

EDITOR'S INTRODUCTION

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Welcome to the third issue of the third volume of the new series of *Amicus Curiae*. We thank contributors, readers and others for supporting the progress that the relaunched journal is making.

This issue begins with contributions on issues of legal aid. These form a Special Section on 'Declining Legal Aid and the Implications for Access to Justice'. In their essay 'The Demise of Legal Aid? Access to Justice and Social Welfare Law after Austerity', Daniel Newman and Jon Robins argue that access to justice is a cause

that needs to be championed for the good of all in society. Their important paper examines the troubled and diminishing role of legal aid in the legal system of England and Wales. Many of the difficulties faced today are the result of the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Reductions to legal aid were a result of the then government's austerity programme and a manifestation of the continuing and intensifying aversion towards state funding of legal services. Using a socio-legal

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perspective, with insights drawn from Robert Merton's idea of middle-range theory and from vulnerability theory, the paper is grounded in empirical analysis of four richly textured illustrative case studies based mainly on semi-structured interviews. The essay also argues for the value of bringing together more closely journalism and social science research. The study examines the consequences for the frontline of the legal aid sector of the LASPO cuts, and governmental aversion to legal aid, and other aspects of social welfare law, such as welfare benefits, debt and housing. This is part of a broader drive to weaken social citizenship and has created a crisis of lack of access to justice, undermining our collective provision against risk and vulnerability. The paper argues that the state needs to consider re-embracing the principles and values of the post-war social welfare state and, more specifically introduce a new Right to Justice Act in England and Wales and alongside it a new Justice Commission. Mauro Cappelletti's emphasis more than 50 years ago, in the early days of the access to justice movement, on the important role that legal aid should play in expanding access and thereby fostering legal equality and more, has been lost from view and needs to be recovered in such legal and institutional reform.

The article contributed by Jessica Mant entitled 'The Family Court in England and Wales: An

Effective Safety Net?' looks at how the decline of legal aid has impaired the extent to which the family court can effectively operate as a safety net for families in crisis. It considers the manner in which the impact of declining support from legal aid in family law has significantly altered the role of the family court in England and Wales. This changed nature of the family court negatively impacts on the sustainability of the family justice system as a whole. The essay shows us how family law advice and representation has been shaped—largely by political pressures—so as to limit parties' access to family justice, especially to lawyers and the family court, when their relationships are in dispute, with negative consequences for the family court, especially its capacity and its working practices. In reflecting on what the future may hold for family justice, the author argues that there is a real need for reform in order to revive and strengthen the place of legal aid in the family justice system, thereby giving parties earlier intervention and more informed choice of process. But even while such reforms are contemplated, a danger to be borne in mind is that for family justice, legal aid provision may be in due course withdrawn entirely.

The co-authored essay contributed by Lucy Welsh and Amy Clarke entitled 'United by Cuts: Exploring the Symmetry between How Lawyers and Expert

Witnesses Experience Funding Cuts' concludes that both defence lawyers and expert witnesses have experienced quite negatively the impact of criminal legal aid funding cuts. The main impact of such cuts has been to undermine the sustainability and quality of service of their work in the criminal process. In particular, defence lawyers have found it difficult to find and to instruct expert witnesses, fundamentally limiting access to justice for clients. Rates of payment have not only failed to increase, but also in some areas even been subject to cuts, and interaction with the Legal Aid Agency has often been a dispiriting experience. It was also clear that both the experts and lawyers were concerned that low payment rates and demoralizing interactions with the Agency have had a negative impact on both the quality of work done and on the long-term sustainability of legally aided services. As a result, the lawyers involved anticipate increased risk of miscarriages of justice and, where they do occur, limited possibilities of rectification. There is an urgent need to reverse policies in legal aid funding in order to prevent further deterioration in the situation.

The essay by Dr Jo Wilding entitled 'Beyond Advice Deserts: Strategic Ignorance and the Lack of Access to Asylum Legal Advice' introduces us to 'reading' the legal aid market in order to understand better the demand and provision

situation, drawing effectively on the work of sociologist Linsey McGoey and others which analyses the concept and issues of 'strategic ignorance'. Her contribution provides several succinct examples of what she characterizes as the 'dark corners' of the immigration legal aid market, and then examines the role of strategic ignorance in restricting and denying access to advice. Pathways of ignorance include, first, belief that the market is able to meet demand; secondly, the avoidance of evidence about the actual malfunctioning of the market; thirdly, fragmentation of control of both policy and operations, leaving wide spaces for ignorance to fester; and, finally, credibility deficits applied to the people caught up in the system, namely those seeking asylum. It concludes by arguing for focused efforts to overcome ignorance with evidence, particularly by the Lord Chancellor, who is effectively ignoring a statutory duty by not so doing.

In his thoughtful article 'Reflections on the Judicial Case Management Experiments of Sir Francis Newbolt' Michael Reynolds follows up on two earlier articles published in *Amicus Curiae*, examining an early, innovative, form of judicial case management. These studies revealed that Sir Francis Newbolt, an Official Referee, in his work between 1920 and 1936, was the pioneer in this processual innovation, laying the foundation for

Official Referees Court procedures which for the most part survive to this day in the Technology and Construction Court. In this article a comparison is drawn between Newbolt's 'Scheme' and the subsequent Access to Justice reforms in England and Wales. This shows in many respects significant equivalence in the objectives of Lord Woolf and Sir Francis—for example, in directing the parties to identify and dispose of the key issues, by dealing directly with an early summonses on directions as a forerunner to case management hearings; by summarily disposing of issues before trial; by pioneering settlement through 'discussions in chambers' and by a quasi-judicial form of informal discussions in chambers resembling mediation but not the actuality. Today's Technology and Construction Court in inheriting processes derived from Newbolt's experiments, practices an efficient form of case management, broadly conforming to the objectives of Access to Justice.

Dr Abdulkadir Yilmazcan's contribution entitled 'The Slow Train to Reforming Anti-Dumping Measures: Concrete Solutions for the Future' follows on from his essay on international trade problems published in the last issue of the journal (*Amicus Curiae*, Vol 2, No 2: 'The Slow Train to Reforming Anti-Dumping Measures'). He argues that while reform of the Anti-Dumping Agreement (ADA) should include a comprehensive

normative amendment of the rules, time limitations, conflicting opinions on issues such as zeroing or public interest, and other issues mean that priority should be given to procedural issues rather than substantive matters. The study proposes changes in anti-dumping processes that would enhance procedural justice. These include, first, publishing best practice guidelines; secondly, creating a standard questionnaire to be used by all World Trade Organization (WTO) members; thirdly, reforming and fixing the Dispute Settlement Mechanism; fourthly, raising awareness among exporters that cooperation with investigating authorities may have a significant effect on the anti-dumping measures imposed; fifthly, improving the accounting systems (especially for Chinese exporters); sixth, a support tool for exporters or exporting countries, such as the Advisory Center on WTO Law in Geneva; and, finally, software to assist exporters to fill in questionnaires.

In the Notes Section, Professor Patrick Birkinshaw, in an extended and reflective examination, considers the new study published by Professor Susan Rose-Ackerman entitled *Democracy and Executive Power: Policymaking Accountability in the US, the UK, Germany and France* (2021). The book asks how administrative law might best enhance democratic accountability in the exercise of executive power.

It gives particular but not exclusive attention to the United States (US), the United Kingdom, Germany and France. The power of government rests heavily on bureaucracy, but how to make bureaucratic institutions and process more accountable and democratic? The importance of this issue is especially pertinent today, as Professor Birkinshaw emphasizes, when the disadvantages of bureaucracy are demonized by deep-space state conspiracy theorists. These ideologues, in some respects at least, are a latter-day manifestation of Weber's critique of the 'iron cage of bureaucracy', but base their appeal on irrationality and the limits of expertise and evidence rather than the creation of an oppressive bureaucracy by the ineluctable progress of rationality and technology. They are all too prepared to ignore the need for efficient and effective administration in the public interest on weighty matters such as social justice, the environment and public health. Representative democracies and their bureaucratic support have at least the potential to reconcile divergent views, sensibly inform decision-making and produce rational outcomes. The task of effective public law is to render accountable and transparent the consultative processes involved in democratisation so that there is adequate control of interest groups and others inclined towards partisanship and secretiveness,

thereby securing acceptable degrees of representativeness, transparency and accountability

Professor Deborah Hensler contributes an analysis of issues involved in legal responses to mass disasters. This includes a review of the recent Netflix film, *Worth*, which has perhaps raised public consciousness of some of the difficult issues involved in such responses. *Worth* is a cinematic drama, portraying the establishment and administration of the 9/11 Victims' Compensation Fund (VCF) in the US. The fund was created by Congress in response to the 9/11 tragedy, in order to deal with the complex and challenging problems involved—so the response was legislative and bureaucratic rather than judicial in nature. It was in part intended to limit the liability of the airlines involved in the tragedy. At the centre of the film is Professor Kenneth Feinberg's role as the fund administrator. A lawyer and mediator well versed in mass tort litigation and settlement, Professor Feinberg was asked to serve as Special Master of the VCF—largely due to his extensive experience and skills in devising solutions to the problems of determining eligibility and compensation amounts in such situations. Professor Hensler's insightful analysis also draws on the writings of Feinberg as well as her own important work and experience in this area of law and legal process. Also central, as the

film's title suggests, is the dilemma of how best to translate the value of a life into a monetary amount, while also giving the chance for claimants to tell their story—of the grief, anguish and loss that they had had to endure as a result of the disasters of September 11. Professor Hensler offers a sensitive and illuminating examination of the work of Professor Feinberg in administering the VCF, contextualizing her analysis in the literature on substantive and distributive justice issues, including the value of taking into account claimants' perceptions of the processes involved in resolving problems, in mass tort compensation.

Also in the Notes section, several other examinations of recent law publications are offered. Dr Ling Zhou considers the impressive collection of essays in honour of Professor Derek Roebuck entitled *Lawyer, Scholar, Teacher and Activist: A Liber Amicorum in Honour of Derek Roebuck* (2020) and Michael Palmer assesses the in-depth study of the decline in legal aid provision associated with the uses of a more market-orientated approach by Dr Jo Wilding under the title *The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Legal Representation* (2021).

Professor Yvonne Daly kindly reports ('Remembering Dr Aonghus Cheevers') on a memorial gathering held at Dublin City University on 6 April 2022 to commemorate the

work and life of a colleague and scholar, Dr Aonghus Cheevers, who had passed away two years earlier. Covid restrictions were in place at the time of his passing and delayed the commemorative event until the second anniversary of his death. The service was attended by Aonghus' family, close relatives and friends, as well as many academic colleagues. He was remembered, among his other strengths, as an emerging scholar of great intellect who had made a significant contribution to the development and understanding of mediation in Ireland.

Dr Max W L Wong offers a Note on a recent (late 2019) Hong Kong case in which it seems that complications in the transplantation of the marriage provisions in Republic of China civil law from mainland China to Hong Kong (Marriage Reform Ordinance [MRO] 1971) has been imperfect inasmuch as it allows for judicial recognition of bigamy. In *Ma Siu Siu, Vivian v Tam Wai Mun, Alice & Another*, the court determined that a marriage celebrated in the early 1960s could not be nullified by a subsequent registered marriage contracted after the Ordinance came into force, with the effect that the man concerned had entered into a marriage whilst still married. Dr Wong points to the fact that, in the drafting process of the MRO, the provisions on marriage had been drawn from the Chinese Civil Code of 1931, and the potential

problem of bigamy was known. However, this potential was realized when, in applying the law in *Ma v Tam*, the court failed to consider adequately contextualizing factors relevant in both mainland China in the 1920s and 1930s, and in Hong Kong when the MRO was being drafted. As a result, the court applied an interpretation of the rules too literally, so that it in effect recognized a bigamous union.

Members of 'CeLIA' (the Centre for Law in Asia) SOAS University of London contribute an introduction to the development and work of the Centre, which is an important part of the law school at SOAS. The Centre is not only a facilitator of research in the region, and of teaching about law and legal development in Asia, but also has a long history in playing a major role in professional legal education programmes for legal professionals in several parts of the continent, designed to promote understanding of differing approaches to legal practice and the rule of law.

Dr Max Wong also contributes this issue's Visual Law piece, entitled 'Abolition of Concubinage in Internet Games in the People's Republic of China'. This examines briefly the problem of internet gaming by young people, and its control, in the mainland People's Republic of China today. Although an issue in many parts of the world, in China the felt need to restrict the conduct of children and juveniles on

the internet is considered especially important as young people are seen as successors to the worthy cause of socialism. Games relating to historical events and stories included in the system of control on the mainland and Dr Wong produces examples which have been subject to a ban on depiction of the traditional practice of taking concubines, especially by members of the elite (including the emperor) in old China. Although games based on this aspect of family life are now censored in the People's Republic, outside the mainland such games have continued to flourish.

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